IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*, Plaintiffs, and UNITED STATES of AMERICA, Plaintiff-Intervenor, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 5:11-cv-360 (OLG-JES-XR) Three-Judge Court [Lead Case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), Plaintiff, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 5:11-cv-361 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
TEXAS LATINO REDISTRICTING TASK FORCE, *et al.*, Plaintiffs, v. RICK PERRY, Defendant.	Civil Action No. 5:11-cv-490 (OLG-JES-XR) Three-Judge Court [Consolidated Case]

MARGARITA V. QUESADA, *et al.*, Plaintiffs, v. RICK PERRY, *et al.*, Defendants.	Civil Action No. 5:11-cv-592 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
JOHN T. MORRIS, Plaintiff, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 5:11-cv-615 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
EDDIE RODRIGUEZ, *et al.*, Plaintiffs, v. RICK PERRY, *et al.*, Defendants.	Civil Action No. 5:11-cv-635 (OLG-JES-XR) Three-Judge Court [Consolidated Case]

UNITED STATES' ADVISORY CONCERNING
***ALABAMA LEGISLATIVE BLACK CAUCUS V. ALABAMA* AND**
ALABAMA DEMOCRATIC CONFERENCE V. ALABAMA

The United States submits this advisory pursuant to the Court's Order (ECF No. 1284) requesting briefing on whether this Court should await a ruling by the Supreme Court in *Alabama Legislative Black Caucus v. Alabama* (No. 13-895) ("*ALBC v. Alabama*") and *Alabama Democratic Conference v. Alabama* (No. 13-1138) ("*ADC v. Alabama*") before issuing a decision in this case.

Because the issues in *ALBC v. Alabama* and *ADC v. Alabama* are not sufficiently similar to the issues raised before this Court, the United States respectfully requests that this Court not delay the resolution of this case. The United States and other plaintiffs here have raised claims of intentional vote dilution—not an issue before the Supreme Court in the Alabama cases—and resolution of that claim alone would support an imposition of preclearance requirements under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c). And a prompt resolution of the United States and Plaintiffs' claims would allow for any further remedial redistricting to occur prior to 2015 qualification deadlines for the 2016 legislative elections in Texas.

I. THE ALABAMA APPEALS DO NOT IMPLICATE THE INTENTIONAL VOTE DILUTION CLAIMS.

In *ALBC v. Alabama* (No. 13-895) and *ADC v. Alabama* (No. 13-1138), the Supreme Court has accepted for plenary review only the plaintiffs' claims brought pursuant to *Shaw v. Reno*, 509 U.S. 630 (1993). In December 2013, a three-judge district court entered judgment for the State defendants on all claims brought by the Alabama Legislative Black Caucus and the Alabama Democratic Conference challenging the 2012 Alabama House and Senate redistricting plans. The claims rejected by that court included intentional vote dilution claims brought by the Alabama Democratic Caucus; one-person, one-vote claims brought by the Alabama Legislative Black Caucus; and *Shaw* claims brought by both plaintiff groups challenging the plans as a whole, as well as certain districts, as racial gerrymanders. *ALBC v. Alabama*, 989 F. Supp. 2d

1227 (M.D. Ala. 2013); *see also id.* at 1287-90 (distinguishing intentional vote dilution and *Shaw* claims before the court); *id.* at 1313 (Thompson, J., dissenting) (dissenting from the denial of plaintiffs' *Shaw* claims and declining to reach intentional vote dilution). The district court also found that the ADC plaintiffs lacked standing to pursue their *Shaw* claims. *Id*. at 1288. Both plaintiff groups sought plenary review of all claims in the Supreme Court. *See* Jurisdictional Statement, *ALBC v. Alabama*, No. 13-895 (U.S. Jan. 23, 2014) (Ex. 1); Jurisdictional Statement, *ADC v. Alabama*, No. 13-1138 (U.S. Mar. 14, 2014) (Ex. 2). The Supreme Court noted probable jurisdiction but limited its review to the *Shaw* claims presented in both appeals. *See ALBC v. Alabama*, 134 S. Ct. 2695 (2014); *ADC v. Alabama*, 134 S. Ct. 2697 (2014). Oral argument confirmed the limited scope of review:

> MR. SCHNAPPER: This Court's *Shaw* jurisprudence channels the conversation that we're having today. The court has identified two constitutional claims that could be raised with regard to the use of race in districting. One is intentional dilution of minority votes for the purpose of minimizing their effectiveness and the second one is *Shaw*. This is—we're advancing a *Shaw* claim.
>
> JUSTICE SOTOMAYOR: You lost on the dilution claim.
>
> MR. SCHNAPPER: We did. We did.

Tr. 17:5-14 (Ex. 3); *see also id.* at 57:8-14 (noting the same).

Because *ALBC v. Alabama* and *ADC v. Alabama* will not consider intentional vote dilution claims, there is no overlap with the intentional vote dilution claims brought by the United States and other Plaintiffs here.[1] Intentional vote dilution occurs when "the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting

[1] The only claim brought by the United States here is that Texas's 2011 Congressional Plan and 2011 House Plan were adopted with the purpose of diluting minority voting strength in violation of Section 2 of the Voting Rights Act, which enforces the voting guarantees of the Fourteenth and Fifteenth Amendments to the United States Constitution. All Plaintiffs who have maintained a discriminatory purpose claim here have brought a similar claim for intentional vote dilution. The United States has not brought a *Shaw* claim here, but some other plaintiffs have brought such a claim.

potential of racial or ethnic minorities,' an action disadvantaging voters of a particular race." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980)); *see also* U.S. Compl. (ECF No. 907). By contrast, *Shaw v. Reno*, 509 U.S. 630 (1993), "recognized a claim 'analytically distinct' from a vote dilution claim." *Miller*, 515 U.S. at 911 (quoting *Shaw*, 509 U.S. at 652); *see also* Trial Tr. 152:13-14, July 29, 2014 (Texas conceding this point in closing argument). "[T]he essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." *Id.* "If race is the predominant motive in creating districts, strict scrutiny applies, and the districting plan must be narrowly tailored to serve a compelling governmental interest in order to survive." *Abrams v. Johnson*, 521 U.S. 74, 91 (1997) (citing *Bush v. Vera*, 517 U.S. 952, 962 (1996)).[2]

In contrast to the "predominant motive" standard for analyzing *Shaw* claims, "'[r]acial discrimination need only be one purpose, and not even a primary purpose, of an official act'" to constitute intentional vote dilution. *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009) (quoting *Velasquez v. City of Abilene*, 725 F.2d 1017, 1022 (5th Cir. 1984)); *see also Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977). Therefore, guidance offered by the Supreme Court to resolve whether race or another factor predominated under *Shaw* will not shape this Court's resolution of the "analytically distinct" intentional vote dilution claim at issue here. *See Miller*, 515 U.S. at 911.

[2] In rejecting the *Shaw* claim, the district court in Alabama did not determine whether race was the predominant consideration in setting the boundaries of individual districts beyond four specific Senate districts. *See, e.g., ALBC v. Alabama*, 989 F. Supp. 2d at 1287 (construing pleadings "as arguing that the Acts as a whole constitute racial gerrymanders"); *see also id.* at 1292-305 (addressing only Senate Districts 7, 11, 22, and 26). The United States has argued as amicus that the Supreme Court should remand to the lower court for a district-by-district analysis of the Alabama redistricting plans under existing precedents. *See* Tr. 29:19-39:12 (argument by the Solicitor General in favor of remand); US Brief as Amicus Curiae at 15-18, *ALBC v. Alabama*, No. 13-895, *ADC v. Alabama*, No. 13-1138 (U.S. Aug. 20, 2014) (Ex. 4).

Critically, a finding of intentional vote dilution in the 2011 Congressional Plan and the 2011 House Plan would be a sufficient basis for this Court to impose a Section 3(c) remedy, the principal form of relief still at issue regarding the 2011 claims. *See* Order at 14-15 (ECF No. 886). Thus, to the extent that this Court determines that the intentional vote dilution claims pending before it "justify equitable relief," 52 U.S.C. § 10302(c), it would not be necessary to reach any *Shaw* claims in order to impose a Section 3(c) remedy based on the 2011 plans.

II. ORDERLY ELECTION ADMINISTRATION FAVORS PROMPT RESOLUTION OF PLAINTIFFS' CLAIMS.

Texas's early candidate qualification period provides an additional reason for this Court to resolve Plaintiffs' claims without waiting for the Supreme Court to rule in *ALBC v. Alabama* and *ADC v. Alabama*. Texas's next elections for its legislature will occur in 2016, and the candidate qualifying period will occur in late 2015. *See* Tex. Elec. Code § 172.023 (setting qualification deadline for the second Monday in December and opening qualification 30 days before that).

Most districts in Texas's 2011 House Plan and 2011 Congressional Plan were also incorporated in plans enacted by Texas in 2013, and if this Court determines that any of those districts were drawn based on intentional discrimination, further remedial redistricting may be necessary. For remedial redistricting to occur before candidate qualification—without shifting the statutory qualifying deadline—districts would have to be redrawn by next fall. However, the Supreme Court may not decide the Alabama cases until the end of its current session, around the end of June 2015. Thus, an earlier ruling by this Court on the claims already submitted reduces the likelihood of any disruption to election administration.

For the foregoing reasons, the United States respectfully requests that this Court not await a ruling by the Supreme Court in the Alabama cases before issuing a decision here.

Date: December 2, 2014

Respectfully submitted,

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